

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

GERALDINE ANDERSON,	)	
	)	No. CV-08-0186-CI
Plaintiff,	)	
	)	ORDER DENYING DEFENDANT'S
v.	)	MOTION TO DISMISS/ MOTION
	)	FOR SUMMARY JUDGMENT AND
UNITED STATES OF AMERICA, <sup>1</sup>	)	SETTING THE MATTER FOR BENCH
	)	TRIAL <sup>2</sup>
Defendant.	)	

Before the court is Defendant's Motion to Dismiss or Motion for Summary Judgment. (Ct. Rec. 21.) Geraldine Anderson (Plaintiff) is represented by attorney Scott Kane, Lacy & Kane, East Wenatchee, Washington; Defendant is represented by Assistant United States

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<sup>1</sup> In her Complaint, Plaintiff improperly names the United States General Services Administration as Defendant. However, under the Federal Tort Claims Act (FTCA), the proper party in this action is the United States. 28 U.S.C. § 2679(a). Future pleading captions shall reflect the proper party.

<sup>2</sup> Although Plaintiff has demanded a jury trial in her Complaint, (Ct. Rec. 1), FTCA claims are tried to the court sitting without a jury. 28 U.S.C. § 2402; *Beins v. United States*, 695 F.2d 591, 597 n.7 (D.C. Cir. 1982).

ORDER DENYING DEFENDANT'S MOTION TO DISMISS/ MOTION FOR SUMMARY JUDGMENT AND SETTING THE MATTER FOR BENCH TRIAL - 1

1 Attorney Frank Wilson. The parties have consented to proceed before  
2 a magistrate judge. (Ct. Rec. 10.)

3 **BACKGROUND**

4 Plaintiff, a 81 year old citizen of British Columbia, Canada,  
5 brings this action under the Federal Tort Claims Act (FTCA), and  
6 seeks to recover for injuries sustained in a fall at the United  
7 States Border Station in Oroville, Washington, (Border Station) on  
8 June 26, 2006. (Ct. Rec. 1.) Plaintiff claims the Defendant did not  
9 meet its duty of care in maintaining the premises at the Border  
10 Station, and its negligence was the cause of her fall and injury.  
11 *Id.* at 2. Specifically, she alleges Defendant failed to fix and  
12 maintain the carpet at the entryway to the Border Station bus lobby,  
13 even though the Border Station employees had reported the ill-  
14 fitting carpet in the entryway was causing a trip hazard. She  
15 claims because of the Defendant's negligence, she tripped and fell  
16 after getting off the bus from Canada, and suffered injury. She  
17 and her friends travel to Oroville regularly to go to the casino.  
18 After her trip and fall, she declined medical care, went on to the  
19 casino and traveled back to Canada the same day on the bus. (Ct.  
20 Rec. 34, Ex. I.)

21 In support of her claim, Plaintiff presents deposition evidence  
22 from her own deposition, and Border Station employees, and other  
23 passengers who saw her fall. She also submits a letter from her  
24 Canadian counsel which sets forth damages and her statement of the  
25 incident, and a report from an engineering expert opining that the  
26 mat as installed was a hazard. (Ct. Rec. 33, 34.)

27 Defendant moves for dismissal for lack of subject-matter  
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jurisdiction and failure to state a claim under the FTCA. (Ct. Rec. 22 at 2). Defendant argues the "independent Contractor exception" to the FTCA bars Plaintiff's claims. *Id.* at 4. Specifically, Defendant asserts dismissal is proper because the maintenance of the Border Station, including the bus lobby, is contracted out, and the employees of the contractors are not federal employees. *Id.* at 5. According to Defendant, under the FTCA, the U.S. government is not vicariously liable for negligent maintenance of the bus lobby carpet by the independent contractor. *Id.*; 28 U.S.C. § 2671.

In the alternative, Defendant denies negligence and moves for summary judgment, asserting that Plaintiff has identified no genuine issues of material fact or evidence to establish that: (1) Defendant breached its duty of care in maintaining the Border Station; (2) the carpet condition was an "unreasonable risk of harm"; and (3) the carpet caused her to trip and fall. *Id.* at 3-4. In sum, Defendant denies negligence, and if there were negligence, asserts no employee of the United States was responsible. *Id.* at 5.

#### **FACTS**

Based on the respective statements of facts submitted by Defendant and Plaintiff, the following material facts appear to be undisputed, unless otherwise noted:

The U.S. General Services Administration (GSA) owns the building in which the Border Station is located and leases it to the U.S. Customs and Border Protection, Department of Homeland Security. During 2005 and including June 25, 2006, CMC, Inc. and Northern Management, Inc. were the independent contractors responsible for the janitorial, custodial, and mechanical maintenance of the Border

1 Station. The contractors used their own supplies and equipment, did  
2 the sweeping, mat and carpet cleaning, and decided what type of  
3 floor mat to use and where to use them. (Defendant's Statement of  
4 Material Facts ¶ 1; see also *id.*, Ex. A, Decl. of David Lutz,  
5 (Assistant Property Manager Oroville Border Station and GSA  
6 employee). GSA did not have day-to-day supervision over the CMC  
7 employees. *Id.*

8 In 2003, the Border Station bus lobby was tiled with a recessed  
9 area left untiled for placement of a mat at the entry way. The  
10 original cocoa fiber mat used at the entry way was replaced sometime  
11 before April 1, 2006, with a plywood sheeting underlay and black  
12 nylon plastic mat. The parties dispute why the mat was replaced.  
13 Defendant states it is because the original cocoa fiber mat smelled  
14 bad and was a fire hazard. *Id.* at ¶¶ 2. Plaintiff, citing  
15 deposition testimony of Border Officers Dan Horsman and Chris  
16 Karabinas, asserts the mat was replaced because the former mat was  
17 a "trip hazard." *Id.* (Ct. Rec. 30 at 8-9; Ct. Rec 34, Ex. B at 46-  
18 48, and Ex. C at 38, 42, 55-56; Ct. Rec. 48, ¶ 2.)

19 If a building tenant at the Border Station had an issue with  
20 maintenance of the building, they would call or email the 24-hour  
21 InfoCenter Service Desk to report it. GSA kept electronic records  
22 of calls/emails to the InfoCenter Service desk. These records  
23 documented of complaints and work requests, the nature of the issue,  
24 the person calling, and the person responding. There were work  
25 order details concerning the bus lobby entrance recessed mat area on  
26 December 7, 2005, and on June 26, 2006. (Defendant's Statement of  
27 Material Facts, ¶ 3-4.) The December 7, 2005, record indicates "the

1 door mat as you enter the building is too thin. The indentation in  
2 the tile is longer than the mat and people are tripping on the lip."  
3 The June 26, 2006, record concerns Plaintiff's fall: "They have a  
4 tile that lifts up right inside the door to the checking area. It  
5 is a trip hazard, and someone fell yesterday. Please check on it  
6 ASAP." Defendant's Statement of Material Facts, Ex. C at 45 and 51.  
7 There is a dispute regarding the number and type of complaints made  
8 to GSA about a trip hazard in the bus lobby. (Ct. Rec. 48, ¶ 3.)

9 No GSA employees were working at the Border Station on June 26,  
10 2006. Defendant's Statement of Material Facts ¶ 6. Plaintiff  
11 objects to the admissibility and relevance of this fact, but does  
12 not controvert it. Recessed entry mats are used in other ports of  
13 entry. Plaintiff objects to admissibility and relevance of this  
14 fact, but does not controvert it. Between January 2003 and June 25,  
15 2006, about 70,000 bus passengers walked through the Border Station  
16 bus lobby entrance. More than 42,000 were 60 years or older.  
17 (Defendant's Statement of Material Facts ¶ 8, Ex. D, Decl. of Jina  
18 Nelson, ¶¶ 2 and 3.) Plaintiff objects to admissibility and  
19 relevance of this fact, but does not controvert it. Between April  
20 2003 and June 25, 2006, Plaintiff entered the Border Station bus  
21 lobby about 25 times. (Defendant's Statement of Material Facts, ¶  
22 9; Ex. E, Decl. of Eric Wilson, ¶¶ 1 and 2; Ex. F, Plaintiff's  
23 Answer to Interrogatory No. 11.) Plaintiff does not controvert, but  
24 objects to this fact on the basis of relevance and lack of personal  
25 knowledge and hearsay.

26 On June 25, 2006, Plaintiff, 79 years old at the time and  
27 living in Kelowna, B.C., got up at 6:00 a.m., took her medication,  
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1 ate, dressed, and drove to the Mall where she boarded the bus to the  
2 casino in Omak, Washington. (Defendant's Statement of Material  
3 Facts, ¶ 10; Ex. F, *Plaintiff's Answer to Interrogatory No. 9.*)  
4 Plaintiff does not controvert, but objects due to lack of relevance.  
5 (Ct. Rec. 48 at 8.) The bus arrived at the Border Station at 10:45  
6 a.m. on a warm, dry day. The normal routine is for the bus driver  
7 to check with the customs officials before the passengers leave the  
8 bus and enter the bus lobby. There are about 50 passengers who exit  
9 the bus and enter the bus lobby entrance through a glass door, which  
10 is pulled open from the right on approach. Defendant's Statement of  
11 Material Facts, ¶ 11; Ex. G, *Deposition of Emily Potts at 13-15.*)  
12 Plaintiff does not controvert, but objects due to lack of relevance.  
13 (Ct. Rec. 48 at 8.)

14 There is significant dispute regarding what caused Plaintiff's  
15 fall. (Defendant's Statement of Material Facts, ¶ 12, 13; Ct. Rec.  
16 48 at 8-13.) Both parties submit evidence in the form of  
17 depositions and interrogatories of witnesses to the accident.  
18 Plaintiff suffered a bump on her forehead and pain in her shoulder,  
19 arm and hip. She did not want to go to the hospital; she re-boarded  
20 the bus, went to the bingo palace for the day, and returned to her  
21 home around 10:30 p.m. (Defendant's Statement of Material Facts, ¶  
22 15; Ex. F, *Plaintiff's Answer to Interrogatory No. 10 (I) and (j).*)  
23 On the day of the accident, Daniel Horsman, Supervisor U.S. Customs  
24 and Border Protection, wrote a memo to GSA telling them of  
25 Plaintiff's fall and "the trip hazard that had been previously  
26 reported to the GSA Facilities Services call number when a previous  
27 bus passenger fell." Defendant's Statement of Material Facts, ¶ 16;

1 Ex. L, Deposition of Daniel J. Horsman, at 23-32, 40-44, 60-63.)

2 **DISCUSSION**

3 **A. Motion to Dismiss- FTCA Independent Contractor Exception**

4 Defendant first moves for dismissal under F ED. R. Civ. P.  
5 12(b)(1) for lack of subject-matter jurisdiction, and 12(b)(6) for  
6 failure to state a claim under the FTCA. It argues the "independent  
7 contractor" exception to the FTCA applies in this case; therefore,  
8 the court does not have jurisdiction. Defendant also argues  
9 Plaintiff can prove no facts to establish negligence.

10 In considering a motion to dismiss under F ED. R. Civ. P.  
11 12(b)(1), the court may evaluate evidence to determine if it has  
12 jurisdiction; however, where the jurisdictional issue is dependent  
13 on factual issues going to the merits, the court employs the  
14 standard applicable to a motion for summary judgment. *Autery v.*  
15 *United States*, 424 F.3d 944, 956 (9<sup>th</sup> Cir. 2005). Further, in  
16 considering a motion to dismiss, "All allegations of material fact  
17 in the complaint are taken as true and are construed in the light  
18 most favorable to [plaintiff]." *Pillsbury, Madison and Sutro v.*  
19 *Lerner*, 31 F.3d 924, 928 (9<sup>th</sup> Cir. 1994). A dismissal for failure  
20 to state a claim is proper only if it is clear beyond a doubt  
21 plaintiff could prove no set of facts that would entitle him or her  
22 to relief. *Id.*; *Parks School of Business, Inc. v. Symington*, 51  
23 F.3d 1480, 1484 (9<sup>th</sup> Cir. 1995).

24 The FTCA is a partial waiver of sovereign immunity making the  
25 United States liable for torts of federal employees acting within  
26 the scope of their employment. *Autery*, 424 F.3d at 956. However,  
27 the United States is not liable for negligent acts or omissions of  
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1 its contractors. 28 U.S.C. § 2671 (the independent-contractor  
2 exception). "Federal law determines whether an individual is a  
3 federal employee." *Autery*, 424 F.3d at 957. "The critical element  
4 in distinguishing a [federal] agency from a contractor is the  
5 Government's power 'to control the detailed physical performance of  
6 the contractor.'" *United States v. Orleans*, 425 U.S. 807, 808  
7 (1976) (quoting *Logue v. United States*, 412 U.S. 521, 528 (1973)).  
8 Therefore, to invoke the independent contractor exception, Defendant  
9 must show the daily operations of a federal agency, are controlled  
10 by the contractor. *Id.* Although Defendant claims it does not have  
11 day-to-day supervision of the cleaning and maintenance of the Border  
12 Station, the evidence viewed in a light most favorable to Plaintiff  
13 shows that GSA has a formal procedure for reporting complaints and  
14 safety issues at the Border Station through a 24-hour InfoService  
15 call center, and once a complaint or issue is reported, GSA  
16 authorizes a work order to address the issue. (Ct. Rec. 23 at 2;  
17 Ex. A, Decl. of David Lutz ¶ 10.) The evidence also shows that  
18 Border Station employees, including members of the agency Safety  
19 Committee (specifically Border Officers Horsman and Karabinas) had  
20 knowledge of the ill-fitting mat in the entry way and were advised  
21 by other Border Station employees that it presented a hazard. (Ct.  
22 Rec. 34, Ex. B (Deposition of Karabinas) at 20.) Further, the  
23 evidence shows that GSA was informed of problems with the entry way  
24 mat by Officer Horsman on December 7, 2005. (Ct. Rec. 25, Ex. C  
25 (Service Request Detail) at 57.) This indicates a degree of  
26 supervision and control over safety issues by GSA and arguably  
27 defeats the relied upon independent contractor exception. Further,

1 Defendant does not provide evidence of the contractual duties of its  
2 contractor that establishes the contractor's duty to repair reported  
3 hazards or safety issues.

4 The evidence, viewed in the light most favorable to Plaintiff,  
5 does not establish as a matter of law that the independent  
6 contractor exception applies in this case. Further, the  
7 jurisdictional issue is intricately entwined with the facts going to  
8 the merits. Plaintiff's evidence raises a genuine issue of material  
9 fact regarding the degree of direct supervision over safety issues,  
10 and the resulting applicability of the independent contractor  
11 exception. Therefore, dismissal for lack of jurisdiction without a  
12 trial is not appropriate. Since the parties have submitted  
13 considerable evidence beyond the Complaint for the court to consider  
14 in its determination, the matter should be treated as a motion for  
15 summary judgment. *Hamilton Materials, Inc. v. Dow Chemical Corp.*,  
16 494 F.3d 1203, 1207 (9<sup>th</sup> Cir. 2007).

17 **B. Motion for Summary Judgment - Negligence/Landowner Breach of**  
18 **Duty**

19 Summary judgment allows the parties to avoid unnecessary trials  
20 when there is no dispute as to the facts before the court.  
21 *Northwest Motorcycle Ass'n v. U.S. Depart. of Agriculture*, 18 F.3d  
22 1468, 1471 (9<sup>th</sup> Cir. 1994). Summary judgment shall be granted where  
23 "there is no genuine issue as to any material fact and . . . the  
24 moving party is entitled to judgment as a matter of law." F ED. R.  
25 Civ. P. 56(c); *British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 951  
26 (9<sup>th</sup> Cir. 1978). Under F ED. R. Civ. P. 56, a party is entitled to  
27 summary judgment where the documentary evidence produced by the  
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1 parties permits only one conclusion. *Anderson v. Liberty Lobby,*  
2 *Inc.*, 477 U.S. 242, 247 (1986); *Semegen v. Weidner*, 780 F.2d 727,  
3 732 (9<sup>th</sup> Cir. 1985). The moving party bears the initial burden of  
4 informing the court of the basis of its motion and identifying  
5 evidence of record it believes demonstrates the absence of "a  
6 genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S.  
7 317, 323 (1986). Rule 56 does not require "the moving party to  
8 support its motion with affidavits or other documents *negating* the  
9 opponent's claim." *Id.* If the moving party satisfies its initial  
10 burden, Rule 56(e) requires the party opposing the motion to respond  
11 by submitting evidentiary materials that designate "specific facts  
12 showing that there is a genuine issue for trial." *Matsushita Elec.*  
13 *Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 n.11(1986).

14 An opponent cannot rest on denials or mere allegations  
15 unsupported by factual data or in a pleading. *Id.*; *Taylor v. List*,  
16 880 F.2d 1040, 1045 (9<sup>th</sup> Cir. 1989). Further, only disputes over  
17 facts that might affect the outcome of the case under the applicable  
18 law will preclude entry of summary judgment. Factual disputes that  
19 are irrelevant will not be counted. *Anderson*, 477 U.S. at 250. In  
20 determining if summary judgment is appropriate, a court must look at  
21 the record and any inferences to be drawn from it in the light most  
22 favorable to the party opposing the motion. *Id.*, at 255. Summary  
23 judgment is to be granted only where the evidence is such that no  
24 reasonable finder of fact could find for the non-moving party. *Id.*,  
25 at 250. Conversely, any doubt about the existence of any issue of  
26 material fact requires denial of the motion. *Id.* at 255

27 Under the FTCA, this tort action is governed by the law of  
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1 Washington, where the injury occurred. *Kangley v. United States of*  
2 *America*, 788 F.2d 533, 534 (1986). To prevail in an action for  
3 negligence under Washington law, a plaintiff must prove: the  
4 existence of a duty of care; a breach of this duty; injury of the  
5 plaintiff; and that a breach of the duty was the proximate cause of  
6 the injury. *Degel v. Majestic Mobile Manor, Inc.*, 129 Wn.2d 43, 48  
7 (1996). Landowner liability for injuries caused by an unsafe  
8 condition attaches only if the owner knows, or should know by the  
9 exercise of reasonable care, that a dangerous situation or  
10 unreasonable risk exists. *Kangley*, 788 F.2d at 534; *Iwai v. State*,  
11 129 Wn.2d 84, 96-97 (1996); *Tincani v. Inland Empire Zoological*  
12 *Soc.*, 124 Wn.2d 121, 139 (1994). The phrase "reasonable care"  
13 imposes on the landowner the duty to inspect for dangerous  
14 conditions, "followed by such repair, safeguards or warning as may  
15 be reasonably necessary for [the invitee's] protection under the  
16 circumstances." *Tincani*, 124 Wn.2d at 139 (quoting the *Restatement*  
17 *of Torts* § 343, comment b.)

18 Recognizing the court may consider evidence submitted and  
19 treat the motion as one for summary judgment, Defendant sets forth  
20 its Statement of Material Facts (Ct. Rec. 23) and argues Plaintiff  
21 produces no evidence to establish a duty, a breach of duty, or that  
22 an unreasonable risk of harm or dangerous condition existed when she  
23 fell. (Ct. Rec. 22 at 7-8.) Defendant also argues the evidence  
24 does not show GSA knew or should have known the mats in the recessed  
25 area presented an unreasonable risk of harm. Rather, it argues,  
26 70,000 visitors walked through the bus lobby without accident for  
27 two and one half years before Plaintiff's accident. (Ct. Rec. 23 at

1 8.) Defendant further asserts that Plaintiff cannot present  
2 testimony from anyone who saw what caused Plaintiff to fall. *Id.*

3 Plaintiff responds that the evidence, viewed in a light most  
4 favorable to her, raises issues regarding not only the unreasonable  
5 risk of harm, but the fact that GSA had actual and constructive  
6 knowledge of the risk and had made several attempts to fix the  
7 problem which was brought to their attention before Plaintiff's  
8 accident by Border Officer and Safety Committee member Trinity  
9 Street and Border Officer Chris Karabinas. (Ct. Rec. 30 at 6, 8, 9,  
10 11.) This evidence conflicts with the Declaration of David Lutz, in  
11 which he states "no one ever complained to me, verbally or  
12 otherwise, about a tripping problem in the bus lobby entrance."  
13 (Defendant's Statement of Material Facts, Decl. of David Lutz at 4.)  
14 Plaintiff also provides evidence from witnesses who saw Plaintiff  
15 fall and attributed it to the condition of the entry way. (Ct. Rec.  
16 30 at 5-7.) This evidence goes to the elements of the claim and  
17 contradicts Defendant's version of the material facts.

18 Viewing the evidence in the light most favorable to Plaintiff,  
19 it cannot be said there are no set of facts she can prove that would  
20 entitle her to relief. Where, as here, material facts are disputed  
21 and "leave room for a reasonable difference of opinion," the issues  
22 of "unreasonable risk of harm" and Defendant's knowledge of the risk  
23 are questions for the finder of fact. *In re Software Toolworks,*  
24 *Inc.* 50 F.3d 615, 621 (9<sup>th</sup> Cir. 1994); *See also, McMillan v. United*  
25 *States*, 112 F.3d 1040, 1044 (9<sup>th</sup> Cir. 1997); *Will v. United States*,  
26 60 F.3d 656, 659-70 (9<sup>th</sup> Cir. 1995). These factual disputes are  
27 material and preclude summary judgment. Accordingly,

1. Defendant's Motion to Dismiss or Motion for Summary Judgment (**Ct. Rec. 21**) is **DENIED**;

2. The matter is set for a four-day bench trial in Spokane, Washington, with the undersigned on **February 1, 2010**, commencing at **9:00 a.m.** A telephonic pretrial conference is scheduled for **January 6, 2010**, at 10:20 a.m.

3. The parties shall confer no later than **December 22, 2009**, prior to the pretrial conference, and a joint pretrial order shall be filed no later than **December 29, 2009**, before the pretrial conference.

5. The parties shall notify the court immediately if there is an agreement to mediate.

The District Court Executive is directed to amend the caption to reflect that the United States of America is the Defendant, file this Order and provide copies to counsel for Plaintiff and Defendant.

DATED December 2, 2009.

DATED December 2, 2009.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS/ MOTION FOR SUMMARY  
JUDGMENT AND SETTING THE MATTER FOR BENCH TRIAL - 13